Supreme Court, U.S.
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No. 87-65

In The
Supreme Court of the United States
October Term, 1987

UNITED STATES OF AMERICA,

Petitioner,

v.

PROVIDENCE JOURNAL COMPANY AND CHARLES M. HAUSER,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITIONER'S REPLY BRIEF

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ARGUMENT

I. Appellate Exhaustion Is Not Required

Petitioner does not argue that respondents were required to exhaust the appellate process before publishing. That would overstate petitioner's position. Petitioner is sensitive to respondents' first amendment claims. Nevertheless, where respondents failed to make any attempt for lawful redress where opportunities existed for judicial relief, respondents should not be allowed to belatedly argue the merits of the underlying claim in defense of their willful contemptuous conduct.

If respondents had attempted lawful means of review and been met with frustration or delay, then, depending on the specific facts, defense by collaterally attacking the underlying order may have been appropriate. *Walker v. City of Birmingham*, 388 U.S. 307, 318 (1967). Respondents chose not to proceed lawfully. They therefore met with no frustration or delay in the appellate process. They therefore should not be allowed to collaterally attack the temporary restraining order in defense of the criminal contempt proceedings.

II. Cobbledick, Ryan & Maness Distinguished

Respondents cite *Cobbledick v. United States*, 309 U.S. 323 (1940), *United States v. Ryan*, 402 U.S. 530 (1970) and *Maness v. Meyers*, 419 U.S. 449 (1975), in support of their argument that they should be permitted to defend their contemptuous activities by establishing that the temporary restraining order was incorrect. Those cases all dealt with situations where no judicial review of court rulings was available. Because no review was pos-

sible in those cases, one would be permitted to defend criminal contempt charges by attacking the validity of the underlying orders. *Cobbledick, Ryan* and *Maness* do not destroy or even contradict the *Walker, United Mine Workers* and *Howat* holdings[1] that violations of orders issued by courts with jurisdiction, however erroneous such orders may be, are to be obeyed and disobedience may be punished as criminal contempt. As Justice Brennan explained when speaking for the Court in *United States v. Ryan:*

> *Walker v. Birmingham*, 388 U.S. 307 (1967), is not to the contrary. Our holding that the claims there sought to be asserted were not open on review of petitioners' contempt convictions was based upon the availability of review of those claims at an earlier stage.

402 U.S. at 532 n.4. Where avenues for judicial review are available, the usual *Walker, United Mine Workers* and *Howat* rule applies.

This case is different from the *Cobbledick* line of cases. Judicial review was available to the Journal. *See* authorities cited in petitioner's brief at 21; *see also Goldblum v. National Broadcasting Corporation*, 584 F.2d 904 (9th Cir. 1978); *In re Halkin*, 598 F.2d 176 (D.C. Cir. 1979) (Circuit Courts of Appeals invoked mandamus for protection of first amendment rights).

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[1]*Walker v. City of Birmingham*, 388 U.S. at 319-21; *United States v. United Mine Workers*, 330 U.S. 258, 290-93 (1947); *Howat v. Kansas*, 258 U.S. 181, 189-90 (1922).

III. Goldblum Distinguished

Respondents cite *Goldblum v. National Broadcasting Company, supra,* as support for the argument that they should not be collaterally barred from raising first amendment issues in defense of the criminal contempt proceedings. The statement in *Goldblum* that a publisher should not be required to take sudden court action while at the same time worrying about whether publication will be treated as a contempt referred to circumstances such as those in that case, 584 F.2d at 907. That case differs from this one in a variety of respects.

Goldblum sought to have the National Broadcasting Corporation (hereinafter "NBC") enjoined from broadcasting a certain film. The complaint was filed slightly more than twenty-four hours before the scheduled NBC telecast was to be aired. In contrast, the Journal, according to Hauser's testimony, felt no need to rush the FBI materials into print. (J.A. 142-43). The Journal requested a postponement of the hearing[2] (J.A. 167); furthermore, the district court was never informed that the Journal felt compelled to publish in spite of or because of the order. This case therefore lacked the urgency which affected the *Goldblum* case.

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[2]The district court had intended to hear the matter within twenty-four hours of the November 13, 1985 chambers conference. The case was continued at the request of the attorneys for the Journal and WJAR-TV—two of the parties which were restrained. This is a fact established by the record and found by the trial court. (J.A. 167, Pet. App. A-3, A-10 - A-11, A-13). It is hardly surprising that Patriarca's attorney had no objection to a continuance. Once the requested restraint was ordered, Patriarca presumably would have been content to agree to an indefinite continuance if the media had asked for it.

In *Goldblum* the district judge issued an order for production of the NBC film so that he could review it for "inaccuracies." 584 F.2d at 906. When the film was not produced, the court imprisoned NBC's counsel until he submitted the film. *Id.* NBC sought expedited review in the court of appeals. *Id.* The sole issue considered by the court of appeals was whether the district court had the power to order production. 584 F.2d at 906 n.1. Of course, petitioner here argues that the district court had authority and its order should have been obeyed. (Pet. Br. 16-32). The Ninth Circuit acted immediately upon NBC's request. *Id.* The Journal sought no judicial review anywhere.

Goldblum's complaint did not advance any theory which would have even the remotest chance of success for securing an injunction. 584 F.2d at 906-07. Patriarca, on the other hand, presented a new and powerful claim for injunctive relief. (J.A. 73, Pet. App. A-18). The information Patriarca sought to have restrained from publication had been obtained in violation of fourth amendment rights.[3] As argued in petitioner's brief at 32-44, the violated temporary restraining order was not transparently invalid.

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[3]The FBI materials had been furnished to the Journal without the FBI's knowledge of the First Circuit's opinion in *Providence Journal Co. v. FBI*, 602 F.2d 1010 (1st Cir. 1979), *cert. denied*, 444 U.S. 1071 (1980). Those materials apparently were distributed to the Journal by mistake. *See Patriarca v. FBI*, 639 F. Supp. 1193, 1196 (D.R.I. 1986); Declaration of FBI Agent Frank C. Underwood, III, *Patriarca v. FBI*, C.A. No. 85-0707B, record item 55.

IV. There Was no "Judicial Lawlessness"

Respondents' brief at footnote 23 quotes from a law review note. That quotation criticizes the collateral bar rule for "seeming to sanction judicial lawlessness."

It was not the district court which was lawless. The district court was attempting to protect Patriarca's privacy rights; it was also attempting to protect the media's first amendment rights by holding a speedy hearing. The Journal first asked for a postponement of the hearing and then eschewed any and all lawful avenues of review and relief.

Respondents made a private determination that the district court was incorrect. They then published a front page story announcing their decision to disregard the court's order and at the same time published the illegally gathered materials in violation of the temporary restraining order. (J.A. 39). The only lawlessness was that of respondents.

V. There Is No Due Process Problem

Respondents argue for the first time that they cannot be punished for criminal contempt consistent with due process of law. (Respondents' Br. 41-43). Respondents argue that one cannot be prosecuted for acts that he did not have fair notice were criminal. (Respondents' Br. 41). They argue that when one engages in conduct " 'in justified reliance upon prior decisions,' " he cannot, consistent with due process of law, be punished for such conduct. *Id.* Respondents then argue that *United States v. Arthur Andersen & Co.*, 623 F.2d 720 (1st Cir.), *cert. denied*, 449 U.S.

1021 (1980), should justify their violation of the temporary restraining order.[4]

This argument should fail for two reasons. First, *Arthur Andersen* does not control. Also, even if it did, respondents make no assertion that they relied upon *Arthur Andersen* when they violated the order or were even aware of that opinion until after they were held in criminal contempt.

Arthur Andersen does not expand the law beyond *Cobbledick* or *Ryan*. It is not a general holding that the collateral bar rule no longer applies in the First Circuit. *See Fernos-Lopez v. United States District Court for the District of Puerto Rico*, 599 F.2d 1087, 1091 (1st Cir. 1979), *cert. denied*, 444 U.S. 931 (1979), *rehearing denied*, 444 U.S. 1103 (1980). The statement in *Arthur Andersen* that a party may obtain appellate review of an order enforcing an Internal Revenue Service summons by litigating the merits of the summons as a defense to a contempt citation is simply in line with the policy set forth in *Cobbledick* and *Ryan*.[5] As discussed above, those cases are not contrary to the collateral bar rule. *United States v. Ryan*, 402 U.S. at 532 n.4.

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[4]As respondents explain (Respondents' Br. 43 n.37), *Arthur Andersen* was urged by respondents in the First Circuit. There was no reference by them at that time, however, to any due process argument.

[5]In *Arthur Andersen* the district court ordered Andersen to comply with the IRS summons. 623 F.2d at 722. Motions for a stay were denied by the district court and the court of appeals. *Id.* Although the district court's enforcement order was a final, appealable order, 623 F.2d at 722 n.5, Andersen complied with it. The issue therefore was rendered moot.

Respondents make no claim that they acted in reliance on what they believe *Arthur Andersen* establishes. The Journal submitted a lengthy memorandum to the district court setting forth why they should not be held in criminal contempt.[6] Many cases were cited in that memorandum but *Arthur Andersen* was not among them. Respondents have not been deprived of due process of law.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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[6]For the convenience of the Court, a copy of the Journal's memorandum has been lodged by petitioner with the Clerk of the Court.